Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1364

ALLAN H. APPLESTEIN,
Petitioner,

vs.

GUSTAVE SIMONS,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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Statement.

The tortured recital by petitioner in discussing the nature of the case and of the facts underlying it ignores the basic issue herein.

In short, this is an action brought by an attorney at law of the State of New York to recover for professional legal services rendered on a *quantum meruit* basis against one who was a non-resident at the time the action was commenced. The petitioner came to New York City and was resident there staying at an apartment there for some length of time. Petitioner, an attorney at law and graduate of Harvard Law School, perceived an opportunity (outside the field of law) to acquire control of a company located in New York (Amos Parrish & Co.) but the acquisition of the company depended upon having a number of circumstances fall into place and which required the institution and maintenance of two separate law actions in the Federal Courts of New York (Southern

District). The petitioner engaged respondent's then law firm (respondent being the successor to the law firm) in New York City on a contingent basis. The two actions were commenced in the Federal Courts in New York and were successful. The respondent thereafter was discharged as petitioner's attorney. The petitioner later moved to Florida, prior to the respondent's having sued petitioner for the value of legal services rendered.

Respondent obtained an order of attachment under the New York *ex parte* attachment statute and the sheriff levied upon a bank account of the petitioner. While attempting to complete service of the summons and complaint in Florida, the petitioner advised the process server (the local sheriff in Florida) that he was out of town but that he would appear in the court proceeding in lieu of service of the summons and complaint. Accordingly, the petitoner in November, 1964, timely appeared in the action (by eminent counsel) and answered the complaint by verified answer. The answer contained, in effect, a general denial, and raised no affirmative or jurisdictional defenses.

By formal motion Special Term ruled upon the question of whether the New York court had obtained *in personam* jurisdiction or solely *in rem* jurisdiction (over the minimal attached property). The court ruled that jurisdiction was *in personam*. An appeal was taken therefrom and the Appellate Court unanimously affirmed said ruling on March 3, 1975. Immediately thereafter, a jury trial was had and a judgment was entered in favor of the respondent on March 27, 1975. Appeal was taken therefrom (no mention of the claim of supposed lack of *in personam* jurisdiction was made therein) and said judgment was unanimously affirmed. Permission was sought from the New York Court of Appeals to appeal said judgment and in addition an appeal was

taken (under a claim of right) to the Court of Appeals on the *in personam* question on constitutional grounds, which applications were both denied and the denial of the appeal on constitutional grounds is here sought to be reviewed.

ARGUMENT.

The Court Below Properly Determined That Jurisdiction Over the Answering Non-resident Defendant Was *In Personam* and Not Limited to the Attached *Res*.

POINT I.

The non-resident defendant's answer to the complaint subjected him to *in personam* jurisdiction.

Prior to the 1969 amendments, CPLR 320 (c) denied any right to a limited appearance.

The drafters of the CPLR expressly recognized this. Fourth Preliminary Report Advisory Committee on Practice and Procedure. Leg. Doc. No. 20 188-89 (1960). The defendant whose property was attached had two choices: No defense and lose the attached property or defend and risk a full *in personam* judgment.

After *Simpson v. Loehman*, 21 N. Y. 2d 305, 234 N. E. 2d 669, 287 N. Y. S. 2d 633 (1947), reargument denied 21 N. Y. 2d 990, 238 N. E. 2d 319, 290 N. Y. S. 2d 914 (1968), the Judicial Conference in 1969 adopted CPLR Rule 320 (c) permitting for the first time a limited appearance.

Historically, prior to the enactment of CPLR Rule 320 (c), the limited appearance was not sanctioned in attachment cases. *Perlak v. Goodyear Tire & Rubber Co.*, N.O.R., 140 N. Y. S. 2d 675, 677, wherein Mr. Justice Martuscello stated:

> "The defendant, by interposing an answer joining issue on the merits has waived any objection it has to the jurisdiction of the Court to render a judgment in personam."

The Court cited with approval *Brainard v. Brainard,* 272 App. Div. 575, 74 N. Y. S. 2d 1, affirmed 297 N. Y. 916, 79 N. E. 2d 744; *Olcott v. Maclean,* 73 N. Y. 223, 225; *Dembo v. Stasig,* 285 App. Div. 16, 135 N. Y. S. 2d 376.

This procedure has been found to be constitutionally permissible, *Brainard v. Brainard, supra.* See also *Cheshire National Bank v. Jaynes,* 224 Mass. 14, 112 N. E. 500 (1916).

To place the matter in proper historical perspective, after *Seider v. Roth,* 17 N. Y. 111, 269 N. Y. S. 2d 99, held that the New York Courts could acquire *in rem* jurisdiction over a non-resident defendant by attachment of his liability insurance policy issued by a New York carrier, *Simpson v. Loehman, supra,* held that where the attached *res* was a liability insurance policy, a limited appearance was possible by the liability insurance carrier, who, after all, was the real party in interest, controlling the litigation and paying the judgment. *Simpson v. Loehman, supra,* made this determination prior to the 1969 Amendments to CPLR Rule 320 (c). A commentator states that one of the reasons for the amendment to CPLR Rule 320 (c) was to terminate the judge made law that was emerging in this area (citing *Tjepkema v. Kennedy,* 31 A. D. 2d 908, 298 N. Y. S. 2d 175, another *Seider* type case. Weinstein-Korn-Miller §320 18 [a]).

It can hardly be disputed that the law in New York under the Civil Practice Act and later under the CPLR, in 1964 when this action was commenced and under the CPLR until Rule 320 (c) was amended in 1969 was that a defendant could not make a special or limited appearance in a quasi in rem action, to defend the attached res. This also was and continues to be the law in other states. Weinstein-Korn-Miller §320 .17 and .18 depending merely on policy considerations a state may choose to follow, scarcely rising to a constitutional, due process mandate. See also *U. S. v. Balanovski,* 236 F. 2d 298, 302, cert. den. 352 U. S. 968.

> "The parties cannot complain of inconvenience since they have come into the jurisdiction, they have had their day in Court on the issues which would settle both the right to the funds and personal liability. There is no constitutional problem."

As another commentator has stated in discussing the amendment to CPLR Rule 320 (c): "The amendment became effective on September 1, 1969 * * *." As to defendants who have already appeared in such actions before September 1, a distinction has to be made. In *Seider v. Roth* case, it has been clear since *Simpson v. Loehman, supra,* that the defendant always had the right to make a limited appearance. As to defendants in other attachment cases, however, presumably they had no right to make a limited appearance before September 1, 1969, and, accordingly, their appearance before that date constituted a submission to in personam jurisdiction which will not be divested by the amendment." Prof. McLaughlin's commentaries to McKinney's Book 7B, CPLR §320, page 374. In *Minichello v. Rosenberg,* 410 F. 2d 106, cert. den. 396 U. S. 844, in which the constitutionality of the *Seider v. Roth* procedure was upheld, the Court's opinion at page 111 in note 7 points out that there is a considerable split among the states and commentators, as to whether

it is unfair to require a defendant to submit to in personam jurisdiction or else forfeit the in rem *res*. But, it cites only two law review articles as taking the more extreme position that due process is thereby violated, i. e., Taintor, Foreign Judgments in Rem, 8 U. Pitts, L. R. 233 (1942), and B. Currie, Attachment and Garnishment in the Fed. Courts, 59 Mich. L. R. 337 (1961), but also cites, to the contra, Restatement of Judgments, §40 (1942).

A reading of Proposal No. 1 of the Judicial Conference in its report to the 1969 Legislature in relation to the CPLR clearly indicates that the new CPLR Rule 320 (c) was based on policy considerations, i. e., "wisdom and fairness" rather than any perceived constitutional mandate.

As was stated by the committee in its final paragraph

> "The Committee is fully aware that problems of *res judicata* (collateral estoppel) are bound to arise as a result of the proposed amendment. It will be the traditional task of the Courts to work out these problems on a case by case basis • • •."

The careful "case by case" basis evolutionary development recommended by the Judicial Conference is hardly consistent with the appellant's position that the amendment was intended to have, and should be given the broad and immediate impact of retroactivity thereby opening the judicial floodgates to a wave of claims attacking the validity of the pre-amendment attachments.

Retroactive operation of statutes is not favored by Courts and will not be given such construction unless the language expressed or by necessary implication requires it. *People ex rel. Beck v. Graves,* 280 N. Y. 405, 410 (1939).

In fact, with the limited exception of *Podolsky v. Devinney,* 281 F. Supp. 488, no other decision can be found which squarely holds that a defendant in any kind of quasi-in-rem action has a constitutional due process right to make a limited appearance. This was a *Seider-Roth* type of attachment following the initial *Simpson v. Loehman* decision, 21 N. Y. 2d 305. This decision was followed by the motion to reargue in *Simpson v. Loehman, supra,* which motion was denied by the Court of Appeals at 21 N. Y. 2d 990 in its now famous memorandum decision which then announced the limited appearance rule in *Seider v. Roth* type cases.

Thus, *Podolsky v. Devinney, supra,* involved a new and controversial attachment situation that is patently different from other kinds of historically approved quasi-in-rem attachments, but, at page 17 of petitioner's petition, the argument is made that any distinction between the result reached in *Simpson v. Loehman,* and other cases other than *Seider v. Roth* types would be an unconstitutional denial of equal protection. This case is factually different from the case at bar since the only nexus therein was the fortuitous issuance of an insurance policy by a New York licensed insurer. Here, all contacts were within New York and involved legal services performed by a New York attorney within New York State on which CPLR 302 in personam jurisdiction could have been based.

The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Safeway Stores, Inc., v. Oklahoma Retail Grocers Assoc.,* 360 U. S. 334; *Merchants Refrigerating Co. v. Taylor,* 275 N. Y. 113.

The decision in *Simpson v. Loehman* makes it quite clear that the Court recognized a fundamental difference between the *Seider v. Roth* type of attachment and other more conventional types. As was stated by the Court of Appeals in *Simpson v. Loehman* at pages 990, 991.

> "Consideration of CPLR 320 (c) and its effect on other types of actions begun by attachment must, of course, await future cases."

In its initial decision, the Court emphasized the unusual and unique element present in a *Seider v. Roth* situation. The insurer is in control of the litigation. The Court in *Minichiello v. Rosenberg, supra,* amplifies the point. In a *Seider-Roth* case the insured is merely a nominal defendant, the real defendant being the insurance carrier. To require the insurance carrier to submit to full in personam jurisdiction created a constitutionally unacceptable result. See also *Rintala v. Shoemaker,* 362 F. Supp. 1044, 1054, n. 19 (D. C. Minn. 1973). In other more conventional attachment situations, some property of the defendant (not the insurance carrier's property) is located within the State providing a more direct nexus and justification for in personam jurisdiction over the defendant. See also *Ownbey v. Morgan,* 256 U. S. 94.

In *U. S. Industries, Inc., v. Gregg,* 540 F. 2d 142, 147, the defendant [Gregg] relied upon the Supreme Court's classic formulation of the constitutional limits to state court jurisdiction.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional

> notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U. S. 457, 463 [61 S. Ct. 339, 85 L. Ed. 278].
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> • • •
>
> Whether due process is satisfied must depend • • • upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.
>
> *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 319, 66 S. Ct. 154, 158, 160, 90 L. Ed. 95 (1945).

The petitioner herein comes clearly within those guidelines; *viz*: he was physically in New York, engaged New York attorneys to assist him in obtaining control of a New York based company, instituted two lawsuits in New York to accomplish same.

Therefore, under CPLR 302, petitioner was *always* subject to New York *in personam* jurisdiction by virtue of New York's "long arm" statute.

Based upon precedents such as *Ownbey v. Morgan, supra,* and *Central Loan & Trust Co. v. Campbell,* 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623, and the factual pattern here (which is in conformity with the guidelines of *Milliken v. Meyer, supra,* and *International Shoe Co. v. Washington, supra*), the New York courts properly held that jurisdiction was obtained *in personam* and the arguments raised by petitioner as to violations of due process and equal protection are in reality "straw men" without vitality or substance.

The petitioner's contacts with New York State were certainly more than the "minimum contacts" required by *Milliken v. Meyer, supra.*

Clearly, Fourteenth Amendment requirements of minimum contacts are present in this garden variety of commercial litigation which scarcely rises to a problem of constitutional import.

Petitioner, an attorney and represented by eminent counsel, voluntarily appeared and defended the action, never formally, in the *pleadings,* ever raising the question of lack of *in personam jurisdiction.* At the time the answer was interposed, this was tantamount to personal service within the jurisdiction giving *in personam* jurisdiction. Assuming, *arguendo,* but not conceding, that petitioner had the right to contest *in personam* jurisdiction, he consciously waived same by appearing and defending on the merits. *D. H. Overmyer Co., Inc., of Ohio v. Frick Co.,* 405 U. S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124.

Indeed, petitioner's conduct in not raising the issue at the trial, but permitting, nay inducing, respondent to proceed at the vigorously contested trial, smacks of entrapment and should not be countenanced.

This ancient matter should be disposed of once and for all. The petitioner has had his day in court but refuses to admit it, impeding and delaying the collection of the judgment awarded.

As has been stated:

> "To everything there is a season, there is a time to every purpose under the heaven. A time to get, and a time to lose."

The petitioner has lost but refuses to admit this fact.

CONCLUSION.

The petition of the petitioner for a writ of certiorari to the Court of Appeals of the State of New York should be denied with costs.

Respectfully submitted,

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